

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF NEVADA

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4 UNITED STATES OF AMERICA ex rel.  
5 JOSHUA LUKE,

6 Plaintiff,

7 v.

8 HEALTHSOUTH CORPORATION, et al.,

9 Defendants.

Case No. 2:13-cv-01319-APG-VCF

**ORDER (1) OVERRULING  
OBJECTIONS AND (2) DENYING  
MOTION TO STAY**

(ECF Nos. 87, 88)

10 Magistrate Judge Ferenbach granted the defendants' motion to disqualify the law firm  
11 Troutman Sanders LLP from representing relator Joshua Luke in this action. ECF No. 86. Luke  
12 objects. Luke also requests I stay the disqualification order until the issue is resolved on appeal.  
13 I overrule the objections and deny the motion to stay. The Troutman firm is disqualified from  
14 representing Luke in this action.

15 **I. BACKGROUND**

16 Luke filed this qui tam action in July 2013. ECF No. 1. The case was sealed while the  
17 United States considered whether it was going to intervene. In May 2017, the United States opted  
18 not to intervene. ECF No. 34. The complaint was served on the defendants in June 2017. ECF  
19 No. 42 at 2.

20 Luke was represented in this action by attorneys from the Troutman firm. The Troutman  
21 lawyers appeared pro hac vice, except attorney Kevin Kieffer, who is a Nevada licensed attorney.  
22 ECF Nos. 38-40; 87 at 2 n.2.

23 In August 2017, the defendants moved to disqualify the Troutman firm from representing  
24 Luke because in early 2017, defendant Healthsouth Corporation hired two Troutman attorneys,  
25 Peter Robinson and Robb Willis, to provide lobbying services for Healthsouth in Georgia. ECF  
26 No. 66-2 at 3. As part of that arrangement, Healthsouth provided confidential information to  
27 Robinson and Willis. *Id.* According to Healthsouth Executive Vice President John Patrick Darby,  
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1 Healthsouth would not have entered into the lobbying agreement had it known that Troutman had  
2 already filed suit against Healthsouth on Luke's behalf in Nevada. *Id.*

3 The lobbying agreement is between Healthsouth and Troutman Sanders Strategies, a  
4 limited liability company wholly owned by the Troutman law firm. ECF No. 66-3 at 3. The  
5 agreement identifies those who will lobby on Healthsouth's behalf, including attorneys Robinson  
6 and Willis. *Id.* at 3. The agreement states that Strategies may receive support from attorneys at  
7 the Troutman law firm with Healthsouth's approval and, if that occurs, Healthsouth would have  
8 to enter into a separate agreement for services with the Troutman firm. *Id.* The agreement states  
9 that Strategies would not be providing legal services to Healthsouth and "[a]ccordingly,  
10 [Healthsouth] will not have an attorney-client relationship with [Strategies] and its employees  
11 with regards to the services that [Strategies] will provide related to the agreement." *Id.* at 4. The  
12 agreement has a "conflict of interest" section which states that Strategies will not lobby positions  
13 that would be in conflict with Strategies' obligations under the agreement. *Id.* It also states  
14 Strategies "is not providing legal services as part of this agreement." *Id.* However, it does not  
15 state that the Troutman law firm may represent someone suing Healthsouth.

16 Although the agreement was with Strategies, Strategies' invoice directed that payment be  
17 remitted to the Troutman law firm. ECF No. 66-4. Additionally, Robinson and Willis used their  
18 Troutman law firm email addresses and phone numbers to communicate with Healthsouth about  
19 their lobbying services. ECF No. 66-2 at 3.

20 Magistrate Judge Ferenbach held a hearing and granted the motion to disqualify  
21 Troutman from representing Luke in this case. ECF Nos. 86, 92. Judge Ferenbach applied the  
22 Nevada Rules of Professional Conduct and concluded that under Nevada law, a lawyer providing  
23 a law-related service such as lobbying is still subject to Nevada's Rules regarding client conflicts.  
24 ECF No. 92 at 24. Judge Ferenbach thus ruled there was a concurrent conflict because Robinson  
25 and Willis both represented Healthsouth and were associated in the same firm with the attorneys  
26 representing Luke in this lawsuit against Healthsouth, and Healthsouth did not give informed  
27 consent to this conflict. *Id.* at 25-26.  
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## II. OBJECTIONS (ECF No. 87)

Luke objects to Judge Ferenbach's disqualification decision. In his initial objection, Luke argues that Judge Ferenbach erred by applying the Nevada Rules of Professional Conduct to the two lawyers who provided lobbying services in Georgia. ECF No. 87. Instead, Luke argues, the court should have applied a choice-of-law analysis and selected Georgia as the state with the most significant relationship with the Georgia lobbyists' conduct and therefore Georgia's Rules of Professional Conduct should have applied. Luke contends that under Georgia law, a lawyer providing lobbying services is not subject to the Rules of Professional Conduct so long as the lobbying client knows legal services are not being provided and no attorney-client relationship is being created. *See* Georgia Bar Rule 4-102 & cmt. 9 (RPC 5.7). Luke asserts the lobbying agreement made clear to Healthsouth that no legal services were being provided and no attorney-client relationship was formed. Healthsouth responds that the Nevada Rules of Professional Conduct apply because the parties agreed that was the law that applied, the Local Rules of this District require it, and applicable authority supports that decision.

Luke moved for leave to file a reply, which I granted. In his reply, Luke argues he has not waived the argument about the applicability of Georgia law because that argument was presented at the hearing in front of Judge Ferenbach. Luke also argues that even if the Nevada Rules control, Rule 1.0A(b) of those Rules directs the court to look to substantive law outside the Rules to determine if an attorney-client relationship exists. Luke contends the substantive law that should apply to make that determination is Georgia law because that is the law governing the relationship between Healthsouth and Strategies.

Healthsouth responds that Luke waived the argument about Rule 1.0A(b) because he did not raise it before the Magistrate Judge or in the objections. Healthsouth also argues on the merits that Judge Ferenbach properly applied the Nevada Rules when deciding whether the Troutman attorneys are disqualified in this case. Healthsouth contends Robinson and Willis would be precluded from representing Healthsouth in this case, and thus the Troutman attorneys appearing in this case with whom Robinson and Willis are associated are likewise disqualified.

1 Healthsouth contends that once Troutman ran a conflicts check, it should have either declined the  
2 lobbying engagement or attempted to obtain Healthsouth's informed consent. Having done  
3 neither, Healthsouth contends the Magistrate Judge properly disqualified the Troutman firm.

4 The standard for review of a magistrate judge's order is "clearly erroneous or contrary to  
5 law." 28 U.S.C. § 636(b)(1)(A); LR IB 3-1(a). I may affirm, reverse, or modify, in whole or in  
6 part, the magistrate judge's ruling, or remand the matter to the magistrate judge with instructions.  
7 LR IB 3-1(b).

#### 8 1. Waiver

9 The defendants argue Luke has waived most of his arguments by not raising them before  
10 the Magistrate Judge or in the objections. I have the discretion to consider evidence and  
11 arguments presented for the first time in an objection to a magistrate judge's order, but I am not  
12 required to do so. *Brown v. Roe*, 279 F.3d 742, 744 (9th Cir. 2002). Given the importance of  
13 disqualifying Luke's counsel of choice, I will address the parties' arguments raised throughout  
14 the briefing.

#### 15 2. Disqualification

16 Courts should subject disqualification motions to "particularly strict judicial scrutiny" due  
17 to the possibility that disqualification motions may be used for tactical advantage and "to harass  
18 opposing counsel." *Shurance v. Planning Control Int'l, Inc.*, 839 F.2d 1347, 1349 (9th Cir. 1988)  
19 (quotations omitted); *see also Brown v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 14 P.3d  
20 1266, 1270 (Nev. 2000) (en banc) (stating "parties should not be allowed to misuse motions for  
21 disqualification as instruments of harassment or delay"). In deciding whether to disqualify an  
22 attorney, I must balance the competing interests of Luke's right to be represented by counsel of  
23 his choice, Healthsouth's "right to be free from the risk of even inadvertent disclosure of  
24 confidential information, and the public's interest in the scrupulous administration of justice."  
25 *Brown*, 14 P.3d at 1269-70. I generally should resolve doubts in favor of disqualification. *Id.* at  
26 1270.

1 “To prevail on a motion to disqualify opposing counsel, the moving party must first  
2 establish “at least a reasonable possibility that some specifically identifiable impropriety did in  
3 fact occur.” *Id.* (quotation omitted). The moving party “then must also establish that the  
4 likelihood of public suspicion or obloquy outweighs the social interests which will be served by a  
5 lawyer’s continued participation in a particular case.” *Id.* (quotation omitted).

6 As attorneys appearing in this district, the Troutman lawyers are bound by the Nevada  
7 Rules of Professional Conduct. LR IA 11-7 (“An attorney admitted to practice under any of these  
8 rules must adhere to the standards of conduct prescribed by the Model Rules of Professional  
9 Conduct as adopted and amended from time to time by the Supreme Court of Nevada, except as  
10 these standards may be modified by this court.”). Under Nevada Rule of Professional Conduct  
11 1.7, “a lawyer shall not represent a client if the representation involves a concurrent conflict of  
12 interest,” unless (among other things) each affected client gives informed consent.<sup>1</sup> A concurrent  
13 conflict exists if “[t]he representation of one client will be directly adverse to another client,” or  
14 “[t]here is a significant risk that the representation of one or more clients will be materially  
15 limited by the lawyer’s responsibilities to another client, a former client or a third person or by a  
16 personal interest of the lawyer.” Nev. R. Prof. Conduct 1.7(a). Nevada Rule 1.0A(b) provides  
17 that “principles of substantive law external to these Rules determine whether a client-lawyer  
18 relationship exists.”

19 Under Nevada Rule 1.10(a), “[w]hile lawyers are associated in a firm, none of them shall  
20 knowingly represent a client when any one of them practicing alone would be prohibited from  
21 doing so by Rules 1.7, 1.9, or 2.2 . . . .” Thus, the question of whether the Troutman lawyers who  
22 have appeared in this case are disqualified turns on whether Robinson or Willis could appear as  
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25 <sup>1</sup> Although the lobbying agreement has since been terminated, I apply the concurrent conflict  
26 standard where the attorney “simultaneously represents clients with differing interests . . . even though the  
27 representation ceases prior to filing of the motion to disqualify.” *Unified Sewerage Agency of Washington*  
28 *Cty., Or. v. Jelco Inc.*, 646 F.2d 1339, 1345 n.4 (9th Cir. 1981). “If this were not the case, the challenged  
attorney could always convert a present client into a ‘former client’ by choosing when to cease to represent  
the disfavored client.” *Id.*

1 Luke's attorneys in this case. The Magistrate Judge's conclusion that they could not was neither  
2 clearly erroneous nor contrary to law.

3 Rule 1.10(a)'s imputed disqualification rule refers back to Nevada's Rules for conflicts.  
4 Under Nevada's Rules, a lawyer cannot concurrently represent adverse clients without the clients'  
5 informed consent. Regardless of how Georgia would define the relationship between the  
6 Troutman lawyers and Healthsouth, if Robinson or Willis attempted to represent Luke against  
7 Healthsouth in Nevada, the Nevada Rules of Professional Conduct would not allow it. *See* State  
8 Bar of Nev. Standing Comm. on Ethics and Professional Responsibility Formal Opinion No. 52  
9 (concluding a lawyer (or a subsidiary of a law firm) who provides lobbying services is subject to  
10 Nevada Rule of Professional Conduct 1.7). Because Robinson and Willis are disqualified, so is  
11 the entire Troutman firm. Nev. R. Prof. Conduct 1.10(a).

12 This does not mean the court is applying the Nevada Rules to the lawyers in Georgia who  
13 had no reason to expect this result. Rather, the court is applying the Nevada Rules to the lawyers  
14 who appeared in Nevada in this case. Because the Nevada Rules apply to these lawyers, it was  
15 incumbent on them to avoid a disqualifying condition under those Rules. Strategies conducted a  
16 conflicts check before accepting the lobbying agreement in Georgia. ECF No. 92 at 17. The  
17 Troutman lawyers thus were aware of the possibility that by accepting the lobbying agreement,  
18 the Nevada representation could be jeopardized, even if Georgia would allow it. The Troutman  
19 lawyers could have attempted to obtain Healthsouth's informed consent or they could have  
20 declined the lobbying agreement. But what they could not do under Nevada law was  
21 concurrently provide law-related services to Healthsouth in Georgia and represent Luke suing  
22 Healthsouth in Nevada.

23 Healthsouth thus has established a violation of the Nevada Rules. Healthsouth also has  
24 shown the likelihood that public suspicion or obloquy outweighs the social interests which will be  
25 served by Troutman's continued participation in this case. I do not discount Luke's interest in  
26 being represented by counsel of his choice and Luke has been represented by Troutman for some  
27 time. But this concern is mitigated by the fact that I concurrently ruled that former Troutman  
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1 attorney Merrill Hirsh may represent Luke now that Hirsh has left the Troutman firm.  
2 Healthsouth's right to be free from the risk of even inadvertent disclosure of confidential  
3 information is not strongly implicated here, as there is no evidence the Troutman attorneys shared  
4 confidential Healthsouth information and the Troutman attorneys deny it under oath.

5       However, the rule against concurrent conflicts is based on the attorneys' duty of loyalty,  
6 the breach of which Nevada does not take lightly. *State Farm Mut. Auto. Ins. Co. v. Hansen*, 357  
7 P.3d 338, 342 n.6 (Nev. 2015) (en banc) ("The representation of clients with conflicting interests  
8 and without informed consent is a particularly egregious ethical violation that may be a proper  
9 basis for complete denial of fees." (quotation omitted)); *Stalk v. Mushkin*, 199 P.3d 838, 843  
10 (Nev. 2009). The public may view with suspicion a multi-state law firm that accepts a lobbying  
11 agreement in one state while representing someone suing the lobbying client in another state  
12 without obtaining informed consent. Weighing the competing interests, disqualification is the  
13 proper result. I therefore overrule the objections to Magistrate Judge Ferenbach's disqualification  
14 ruling. The Troutman firm is disqualified from representing Luke in this action.

### 15 **III. MOTION TO STAY (ECF No. 88)**

16       Luke requests I stay the disqualification order pending appeal. Luke argues there are  
17 serious questions on the merits and disqualifying his counsel of choice is irreparable. Luke  
18 contends the balance of hardships tips sharply in his favor because he is denied counsel of choice  
19 even though he did nothing wrong and any Healthsouth confidential information given to  
20 Robinson and Willis has not been disclosed to the Troutman attorneys in this case. Finally, he  
21 contends the public interest favors a stay because disqualification will disrupt the proceedings in  
22 this case.

23       The defendants respond that Luke is unlikely to prevail on appeal and Luke is not  
24 irreparably harmed if he must temporarily retain additional counsel while his appeal is pending.  
25 The defendants argue they would be irreparably harmed by conducting discovery with a  
26 disqualified firm and potentially have to redo discovery if substitute counsel is required. The  
27 defendants also contend that given how long an appeal will take, the disqualification order will  
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1 effectively be moot because the Troutman firm will be able to litigate the case in the meantime.  
2 Finally, the defendants contend the public interest favors disqualification because to be  
3 disqualified in the first place, the conduct must undermine public confidence in the judicial  
4 system. The defendants also argue that if the court is inclined to stay the disqualification order,  
5 then the entire case should be stayed pending resolution of that issue.

6 To qualify for a stay, Luke must demonstrate: (1) a likelihood of success on the merits, (2)  
7 a likelihood of irreparable harm, (3) whether the stay will “substantially injure the other parties  
8 interested in the proceeding,” and (4) a stay is in the public interest. *Golden Gate Rest. Ass’n v.*  
9 *City & Cty. of S.F.*, 512 F.3d 1112, 1115 (9th Cir. 2008) (quotation omitted). Alternatively,  
10 under the sliding scale approach, Luke must demonstrate (1) serious questions on the merits, (2) a  
11 likelihood of irreparable harm, (3) the balance of hardships tips sharply in his favor, and (4) a stay  
12 is in the public interest. *Id.* at 1116.

13 There are serious questions going to the merits. It is not a frivolous position that the  
14 Nevada Rules of Professional Conduct would direct the court to look outside those Rules to  
15 determine whether an attorney-client relationship existed, that a choice-of-law analysis would  
16 favor applying Georgia law to determine the nature of the relationship between Strategies and  
17 Healthsouth, and that there was no attorney-client relationship giving rise to a conflict under  
18 Georgia law.

19 Disqualification may constitute irreparable harm because it “immediately deprives the  
20 losing party from the representation of his choice and disrupts the litigation.” *Watkins v. Trans*  
21 *Union, LLC*, 869 F.3d 514, 519 (7th Cir. 2017) (quotation omitted). Those concerns are  
22 significantly lessened here, however, because by separate order I have ruled that attorney Hirsh  
23 may continue to represent Luke going forward. Hirsh has “spent many hours discussing the case  
24 with Dr. Luke,” was “the most senior attorney who has worked on this case,” and was  
25 “responsible for its day-to-day management.” ECF No. 88-3 at 1. Consequently, Luke will not be  
26 deprived of one of the most active, senior, and knowledgeable attorneys of his choice. Luke also  
27 has been represented in this matter from the beginning by Craig Delk of Thorndal, Armstrong,  
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1 Delk, Balkenbush & Eisinger. Delk and his firm have not been disqualified. ECF No. 1. Thus,  
2 Luke is not completely deprived of counsel of his choice and the litigation will not be  
3 substantially disrupted absent a stay.

4 Given these circumstances, the balance of hardships does not tip sharply in Luke's favor.  
5 Luke retains counsel of his choice, as Hirsh and Delk will remain on the case. In contrast, if I  
6 stayed the disqualification, Healthsouth would be forced to conduct the litigation against a law  
7 firm that formerly represented it, likely throughout the entire proceedings in this court. Due to  
8 heavy caseloads, appeals to the Ninth Circuit unfortunately can take a long time. The  
9 disqualification decision would effectively be nullified if Troutman were able to continue  
10 representing Luke in this case while he appeals my ruling. For these same reasons, the public  
11 interest does not favor a stay. I therefore deny it.

#### 12 **IV. CONCLUSION**

13 IT IS THEREFORE ORDERED that relator Joshua Luke's objections (**ECF No. 87**) are  
14 **OVERRULED**. The Troutman Sanders LLP law firm is disqualified from representing Luke in  
15 this action.

16 IT IS FURTHER ORDERED that relator Joshua Luke's motion to stay (**ECF No. 88**) is  
17 **DENIED**.

18 DATED this 10th day of November, 2017.

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22 ANDREW P. GORDON  
23 UNITED STATES DISTRICT JUDGE  
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